82-1001

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

**UNITED STATES OF AMERICA;
AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., ET AL.,**

Appellees.

On Petition For Direct Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, under the Sherman Act, 15 U.S.C. §2, the United States District Court for the District of Columbia may, by entering a consent decree ending the prosecution of a private party by the United States Department of Justice, compel changes in the intrastate conduct or operation of an Illinois utility, Illinois Bell Telephone Company, which conflict with Illinois statutes and regulatory orders of the Illinois Commerce Commission acting pursuant to said law.

PARTIES TO THE PROCEEDING IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The following persons were parties to the proceeding before the United States District Court for the District of Columbia: United States Department of Justice; American Telephone and Telegraph Company; Ad Hoc Telecommunications Users Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations, Inc.; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communication Workers of America; Compuserve, Inc.; Computer & Business Equipment Manufacturers Association; Computer & Communications Industry Association; Congress Watch; Continental Telcom; D/FW Signal; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission; General Dynamics Co.; GTE Corporation; Independent Data Communications Manufacturers Association; Independent Telecommunications Suppliers Council; International Telephone & Telegraph; Jack Faucett Associates *et al.*; Leghorn Telepublishing Company; Mobil Marine Radio, Inc.; NAACP; National Association for Better Broadcasting; National Association of Broadcasters; NARUC; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting;

National Latino Media Coalition; National Newspaper Association; North American Telephone Association; Northeastern Telephone Co.; Office of Communication United Church of Christ; Reformed Church in America; Rogers Radio Communications Services; Rural Telephone Coalition; San/Bar; Satellite Business Systems; Sonitrol Distributors Council; Southern Pacific Communications Company; Sperry Corporation; Stromberg-Carlson Corporation; Tandy Corporation; Telecator Network of America; U.S. Telephone Communications; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications: Utilities Telecommunications Council; Warner Amex Cable Communications; Western Union Telegraph Co.; Westinghouse Broadcasting & Cable; Arizona; California; Colorado; Delaware; Illinois; Maine; Maryland; Michigan; Missouri; New Hampshire; New Mexico; New York; North Carolina; Oregon; Pennsylvania; Tennessee; Virginia; Wisconsin; Arkansas Public Utilities Commission; California Public Utilities Commission; District of Columbia Public Service Commission; Florida Public Service Commission; Idaho Public Utilities Commission; Kentucky Public Utilities Commission; Michigan Public Utilities Commission; Montana Public Utilities Commission; Nebraska Public Utilities Commission; Nevada Public Utilities Commission; New York Public Utilities Commission; South Dakota Public Utilities Commission; Utah Public Utilities Commission; West Virginia Public Utilities Commission; Wyoming Public Utilities Commission; Iowa Commerce Commission; Kansas State Corporation Commission; New Mexico Corporation Commission; Ohio Consumers Council; Oklahoma Corporation Commission; Virginia State Corporation Commission; Washington Transportation & Utilities Commission; City of Cincinnati; City of New York; and MCI Communications Corporation.

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Appellees.

On Petition For Direct Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

The People of the State of Illinois ("Illinois"), by Tyrone C. Fahner, Attorney General of Illinois, appeals from the decision of the United States District Court for the District of Columbia and asks this court to exercise appellate jurisdiction under 15 U.S.C. §29(b).

OPINION BELOW

The opinion of the United States District Court for the District of Columbia was entered on August 11, 1982. The opinion is not yet officially reported.* In that opinion, the court held that the Sherman Act, 15 U.S.C. §2 *et seq.*, as amended, pre-empts validly enacted state regulatory statutes to the extent that such state statutes conflict with the terms of a consent decree offered to the court by the United States Department of Justice and a private party. Slip Op. at 43-47. As a result, certain sections of the Illinois Public Utilities Act, ILL. REV. STAT. ch. 111⅔ par. 1 *et seq.*, have been pre-empted to the extent they conflict with the Opinion of August 11, 1982 and the subsequent entry of a consent decree on August 24, 1982.

JURISDICTIONAL STATEMENT

The instant appeal is from a judgment entered in the United States District Court on August 24, 1982. On that date, the court entered a consent decree settling an action brought by the United States Department of Justice under the Sherman Act, 15 U.S.C. §2, as amended, against the American Telephone and Telegraph Company. The consent decree, which disposed of all substan-

* Illinois has joined in the filing of a Joint Appendix (J.A.) in which this opinion is located.

tive matters raised in the complaint except for the filing of a divestiture plan, is a final order. *See, Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Illinois, on October 29, 1982, filed a timely notice of appeal to the Circuit Court of Appeals for the District of Columbia Circuit.

The district court below, on November 10, 1982, entered an order certifying that a direct appeal to this Court, under the terms of the Expediting Act, 15 U.S.C. §29(b), "is of general public importance in the administration of justice."

STATUTES INVOLVED

The Supremacy Clause, as set forth in the United States Constitution article VI, Cl.2 provides:

> . . . This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The Sherman Act, 15 U.S.C. §2, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or

by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Expediting Act, 15 U.S.C. §29(b), as amended, provides in pertinent part that:

> ". . . . (b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

The Antitrust Penalties and Procedures Act, 15 U.S.C. §16(d) through (f) provides:

> "**(d) Receiving of and response to written comments.** During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal of the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be

shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Judicial determination of public interest; considerations. Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Judicial determination of public interest; procedure. In making its determination under subsection (e), the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual,

group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate."

Ill. Rev. Stat. ch. 111⅔ par. 1 provides:

1. Illinois commerce commission—Appointment—Terms—Quorum

§ 1. There is created an Illinois Commerce Commission consisting of 5 members not more than 3 of whom shall be members of the same political party at the time of appointment. The Governor shall appoint the members of such Commission by and with the advice and consent of the Senate. In case of a vacancy in such office during the recess of the Senate the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor shall be appointed and qualified. Each member of the commission shall hold office for a term of 5 years from the third Monday in January of the year in which his prede-

cessor's term expires. Each member shall serve until his successor is appointed and qualified. The Governor shall from time to time designate the member of the commission who shall be its chairman.

The Chairman of the Commission, in order that the Commission may perform the duties and exercise the powers granted to it and assume its responsibilities, under this Act and any and all other statutes of this State, may organize the Commission and the staff thereof, into such departments, bureaus, sections or divisions as he may deem appropriate, and in connection therewith the Chairman may delegate and assign to one or more Commissioners, staff members or member, the supervision and direction of any such department, bureau, section or division.

A majority of the Commission shall constitute a quorum to transact business, but no vacancy shall impair the right of the remaining commissioners to exercise all of the powers of the Commission; and every finding, order or decision approved by a majority of the members of the Commission shall be deemed to be the finding, order or decision of the Commission.

Ill. Rev. Stat. ch. 111⅔ par. 8a provides in pertinent part:

8a. Jurisdiction over stockholders, affiliated interests—Disclosure of identity of owner of substantial interest

(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such

affiliated interests, as the Commission may prescribe. For the purpose of this Section, the phrase "affiliated interests" means:

(a) Every corporation and person owning or holding, directly or indirectly, 10% or more of the voting capital stock of such public utility;

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it has first been filed with and consented to by the Commission. The Commission may condition such approval in such manner as it may deem necessary to safeguard the public interest. If it be found by the Commission, after investigation and a hearing, that any such contract is not in the public interest, the Commission may disapprove such contract. Every contract or arrangement not consented to or excepted by the Commission as provided for in this Section is void . . .

Ill. Rev. Stat. ch. 111⅔ par. 9 provides:

9. Utilities to comply with requests and to obey orders of commission

§ 9. Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all questions submitted by the Commission.

Any public utility receiving from the Commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or

general manager of such public utility and returned to the Commission at its office within the period fixed by the Commission.

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with the observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

Ill. Rev. Stat. ch. 111⅔ par. 10.3 provides in pertinent part:

10.3. "Public utility" defined

§ 10.3. "Public utility" means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

b. the transmission of telegraph or telephone messages between points within this State;

Ill. Rev. Stat. ch. 111⅔ par. 29 provides:

29. Transfer of franchises, etc.

§ 29. No franchise, license, permit or right to own, operate, manage or control any public utility shall be assigned, transferred or leased nor shall any contract or agreement with reference to or affecting any such franchise, license, permit or right be valid or of any force or effect whatsoever, unless such assignment, lease, contract, or agreement shall have been approved by the Commission. Such permission shall not be construed to revive or validate any lapsed or invalid franchise, license, permit or right, or to enlarge or add to the powers and privileges contained in the grant of any franchise, license, permit or right, or to waive any forfeiture.

The provisions of this Section shall not apply to any transactions by or with a political subdivision or municipal corporation organized under the laws of this State.

Ill. Rev. Stat. ch. 111⅔ par. 30 provides:

30. Valuation

§ 30. The Commission shall have power to ascertain the value of the property of every public utility in this State and every fact which in its judgment may or does have any bearing on such value. In all proceedings before the Commission, initiated by the Commission upon its own motion, or initiated by an application of such public utility, in which the value of the property of any public utility or utilities is an issue, the burden of establishing such value shall be upon such public utility or utilities. In making such valuation the Commission may avail itself of any information, books, documents, or records in the possession of any officer, department or board of the State or any subdivision thereof. The Commission shall have power to make revaluation from time to time and also to ascertain the value of all new construction, extensions, and additions to the property of every public utility.

Ill. Rev. Stat. ch. 111⅔ par. 41 provides:

41. Rates and regulations—Establishment

§ 41. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts, or practices or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. However, it shall be proper for the Commission to consider as an operating expense, for the purpose of determining whether a rate or other charge or classification is sufficient, donations made by a public utility for the public welfare or for charitable, scientific, religious or educational purposes, provided that such donations are reasonable in amount.

The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

Ill. Rev. Stat. ch. 111⅔ par. 47 provides:

47. Telephone and telegraph connections

§ 47. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall determine that public convenience and necessity require a physical connection for the establishment of a continuous line of communication between any two or more public utilities for the conveyance of messages or conversations, the Commission may, by order, require that such connection be made. If such public utilities do not agree upon the division between them of the cost of such physical connection or connections, the Commission shall have authority, after further hearing, to establish such division by supplemental order.

Ill. Rev. Stat. ch. 111⅔ par. 49a provides in pertinent part:

49a. Abandonment or discontinuance of service—Approval by commission—Exceptions—Curtailment or discontinuance of service to individual customers or classes—Non-liability for damages

§ 49a. Except as provided in Section 49b, no public utility shall abandon or discontinue any service without first having secured the approval of the commission, except in case of assignment, transfer, lease or sale of the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property to any political subdivision or municipal corporation of this State. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Provided, however, that any public utility abandoning or discontinuing service in pursuance of authority granted by the commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the commission in that regard. Provided, further, that nothing in this section shall be construed to limit the right of a public utility

to discontinue service to individual patrons in accordance with the effective rules, regulations, and practices of such public utility.

The commission, after a hearing upon its own motion or upon petition of any public utility, shall have power by order to authorize or require any public utility to curtail or discontinue service to individual customers or classes thereof, or for specific purposes or uses, and otherwise to regulate the furnishing of service. . . .

Ill. Rev. Stat. ch. 111⅔ par. 56 provides in pertinent part:

56. Certificate of convenience and necessity

§ 55. No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. . . .

STATEMENT OF THE CASE

On January 8, 1982, the United States Department of Justice ("United States", "DOJ") and the American Telephone and Telegraph Company ("AT&T") filed in the United States District Court for the District of Columbia a stipulation to dismiss the DOJ's pending antitrust suit without prejudice, and to modify the final judgment ("MFJ") entered in *United States v. Western Electric Co., Inc.*, 1956 Trade Cas. (CCH) ¶68,246 (D.N.J. 1956) (1956 consent decree). The MFJ required AT&T, *inter alia*, to divest its twenty-two Bell Operating Companies ("BOCs"), the chief purveyors of local phone services. In return, the MFJ restricted the BOCs from providing and permitted AT&T to provide intrastate toll calls, directory services advertising, and customer premises equipment ("CPE").

On January 14, 1982, the New Jersey District Court transferred *United States v. Western Electric Co., Inc., supra*, to the United States District Court for the District of Columbia.* Further, the latter court ordered that the provisions of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. §§ 16(b)-(f), require a finding whether entry of the MFJ was in the "public interest."

On April 11, 1982, the People of the State of Illinois ("Illinois"), pursuant to the APPA, filed comments on three aspects of the proposed MFJ. First, Illinois reasoned that entry of the MFJ would constrain the valid statutory authority of the Illinois Commerce Commission to regulate intrastate public utilities. For example, the

* It was docketed under C.A. No. 82-0192.

MFJ effectively releases Illinois Bell Telephone Company ("IBT") from its state commission-approved obligation to interconnect with independent telephone companies, and requires IBT to transfer certain assets to AT&T without seeking necessary approval from the Illinois Commerce Commission. Second, Illinois discussed the MFJ's potentially adverse impact on rural areas and the poor. Finally, Illinois suggested that the MFJ would jeopardize the BOC's financial integrity by unnecessarily restricting the scope of service they were allowed to provide.

On May 25, 1982, the district court invited "interested parties" to submit briefs on issues specified in its memorandum. Such issues included the powers of a court in an APPA proceeding (Issue 1), the MFJ's impact on the BOCs (Issue 2), and the effect of the MFJ on existing state regulatory statutes. Illinois filed briefs on these three issues. Consistent with its *Comments*, Illinois argued, *inter alia*, that the proposed MFJ could not invalidate a clearly articulated, pervasive, and directly supervised state statutory scheme. The court heard oral argument on these issues on June 29 and 30, 1982.

On August 11, 1982, the district court filed an Opinion from which this direct appeal is brought. The court held, *inter alia*, that a federal court remedy under the Sherman Act, 15 U.S.C. §2, as amended, pre-empts conflicting state regulation regardless of the state action doctrine. Slip Op. at 43-47.

On August 24, 1982, the district court entered, with suggested revisions, the proposed MFJ. On August 26, 1982, it granted intervenor status to numerous persons, including Illinois.

On October 29, 1982, Illinois timely filed its notice of appeal. *See*, Appendix A-1. On November 4, 1982, the

State of Maryland moved, under the Expediting Act, 15 U.S.C. §29(b), for a direct appeal to this Court. Illinois adopted this motion on November 8, 1982. *See*, Appendix A-3. Pursuant to the procedures of 15 U.S.C. §29(b), the United States District Court for the District of Columbia, on November 10, 1982, certified this case for expedited appellate review.

The gravamen of this appeal concerns the breadth of a federal court's remedial powers when such remedies undermine well-settled state statutes and policies. This Court should accept this direct appeal to decide whether, under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), a state's clearly articulated, pervasive, and directly supervised regulatory system, such as that found in Illinois, may be preempted by a remedy fashioned under the jurisdictional aegis of the Sherman Act.

REASONS FOR TAKING JURISDICTION OF THIS DIRECT APPEAL

In holding that a federal antitrust remedy can pre-empt valid state regulatory systems, the district court departed from accepted notions of federalism. The MFJ rearranges the delicate balance this Court has struck between the plenary power of Congress to regulate interstate commerce and the rights of States to regulate integral state functions and make fundamental policy choices. Therefore, this Court should review the MFJ under the expedited procedures provided in 15 U.S.C. §29(b) to determine whether valid state public utility regulation can be pre-empted incidental to the entry of an antitrust consent decree.

I.

THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE SHERMAN ACT PRE-EMPTS VALID STATE REGULATORY SYSTEMS.

The district court erroneously held that a remedy under the Sherman Act pre-empts clearly-articulated, directly supervised state regulatory systems. Slip Op. at 43-47. This ruling defies the doctrine stated in *Parker v. Brown, supra*, and its common law and constitutional underpinnings, which permit certain state regulation to supplant competition.

Sovereign authority to regulate commercial activity within a reasonably well-developed law of trade restraints rests firmly on English common-law. This Court observed in *Munn v. Illinois*, 94 U.S. 113, 125 (1876), many years before the passage of the Sherman Act:

> [I]t has been customary in England from time immemorial, and in this country from its first coloniza-

> tion, [for the sovereign] to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., . . .

Since the passage of the Sherman Act, this Court has continually affirmed States' inherent powers to regulate the health and safety of their citizens through clearly-articulated and directly supervised statutory systems. The seminal state action doctrine case is *Parker v. Brown*, 317 U.S. 341 (1943).* In *Parker*, a state court had struck down a statewide regulatory system for the raisin industry stating that such a law was pre-empted by the Sherman Act. The United States Supreme Court, on direct appeal, reversed. This Court, per Chief Justice Stone, reasoned that principles of federalism, absent a contrary expression of Congressional intent, permit a state to regulate commercial activity within its borders. This Court stated:

> [The state program] derived its authority and its efficacy from the legislative command of the state . . . We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state . . . from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed

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* While *Parker* is the case most often cited in support of the Sherman Act's inapplicability to sovereign state regulatory systems, earlier decisions reached the same conclusion. As early as 1895, a federal circuit court held that the Sherman Act did not pre-empt state liquor regulation. *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895). The United States Supreme Court held in 1904 that state regulation of river boat pilots was not pre-empted by the Sherman Act or invalidated by the Fourteenth Amendment. *Olsen v. Smith*, 195 U.S. 332 (1904).

> purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-1.

This Court concluded that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action." *Id.* at 351.

This Court has consistently adhered to the principles espoused in *Parker*. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), a state trial court invalidated a state statute which regulated the economic activities of oil companies in the state. The state appellate court reversed. The United States Supreme Court affirmed, holding that the state statute was not pre-empted by the Robinson-Patman Act or Sherman Act because "[t]his Court is generally reluctant to infer pre-emption." *Id.* at 132. This Court reasoned that even if the state statute is anticompetitive and "there is a conflict between the statute and the central policy of the Sherman Act . . . this sort of conflict cannot itself constitute a sufficient reason for invalidating the [state] statute." *Id.* at 133. This Court further reasoned that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed." *Id.*

Similarly, in *New Mexico Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), this Court reversed a district court which held a state statute regulating retail motor vehicle dealerships was pre-empted by the Sherman Act. This Court held:

> The dispositive answer is that the [state's] regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom . . . The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. *Parker v. Brown.*

Id. at 109. *See also, Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Cf., California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105-6 (1980) (this Court held a state regulatory statute was pre-empted by the Sherman Act by reasoning that although the intent to displace competition was clearly expressed, the State itself did not directly supervise the regulation and thus "failed to meet the second requirement for *Parker* immunity.")

Thus, *Parker* and its progeny allow states to supplant competition with regulation. The Sherman Act will not pre-empt a state regulatory system which the state clearly promotes and directly supervises.

The district court erroneously held that the Sherman Act pre-empts valid state regulatory systems such as the Illinois Public Utilities Act, ILL. REV. STAT. ch. 111⅔ par. 1 *et seq.* ("ILPUA"). ILPUA satisfies both *Parker* requirements. First, ILPUA clearly expresses Illinois' intent to displace competition in the intrastate telephone industry with regulation by the Illinois Commerce Commission ("Commission"). ILL. REV. STAT. ch. 111⅔ pars. 1, 56. *See also, Illinois State Telephone Co. v. Illinois Commerce Commission*, 39 Ill. 2d 239, 243, 234 N.E.2d 769, 771 (1968) (Illinois law promotes limited monopolies to avoid cutthroat competition). Second, ILPUA provides for direct Illinois Commerce Commission supervision over various aspects of intrastate public utility regulation. For example, the Commission is authorized to approve all transactions between a state public utility, such as IBT, and its affiliated interest, AT&T. ILL. REV. STAT. ch. 111⅔ pars. 8a(2)(a), 29. The district court's order in this case requires IBT to transfer certain assets, without seeking the Commission's statutory consent. Further, the Commission is authorized to order IBT to interconnect with independent telephone companies to provide intrastate toll service. ILL. REV. STAT. ch. 111⅔ par. 47.

The MFJ, however, forbids IBT from providing intrastate toll service.

Thus, although the ILPUA clearly provides for Commission regulation of intrastate public utilities, the MFJ attempts to ride roughshod over Illinois' intricate regulatory machinery. Such pre-emption would emasculate the ILPUA and relegate the Commission to be a mere implementer of a federal antitrust remedy. An affirmance in this case could establish a precedent which derogates the general authority of states to regulate wholly intrastate public utilities. The impact of this decision would be sweeping, affecting not only millions of telephone customers, hundreds of telephone companies, but also the integrity of state regulatory systems.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal, and remand to the district court with orders to vacate the MFJ to the extent it conflicts with state regulatory systems.

Respectfully submitted,

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